Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MEHRDAD SABZEVARI, PETITIONER

v.

THE RELIABLE LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

One of our founding fathers stated that the United States should be "[a] government of laws and not of men." John Adams, Novanglus Papers," no. 7.- *The Works of John Adams*, ed. Charles Francis Adams, vol. 4 p. 106 (1851).

The law in the current case is that all facts are to be interpreted in the light most favorable to the nonmoving party. *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949). The applicable law, and not the will of the court, should be the determinative factor not only in the current case, but in any case. See *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). The basic question for the lower court is whether there are sufficient facts that a reasonable jury could infer in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986). If the answer is yes, then the court must leave the matter for the trier of fact to decide. The reason for this is quite simple, we are a republic based on decisions by a jury of our peers - not decisions by judges. As Justice O'Connor stated "a good judge applies the law as it is, not as she wants it to be." Justice Sandra Day O'Connor, "How to Save our Courts", Parade, February 24, 2008, p. 4.

In 2006, the Supreme Court recognized the importance of avoiding the uncertainties and unfair discrepancies that can plague a judicial effort in evaluating Title VII cases. *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405, 2415 (2006).

Parties in the 5th Circuit should be able to get the same justice as parties in the 1st or 10th Districts. The

laws should be applied uniformly. When laws are not applied uniformly we enter a slippery slope that threatens the consistency and preservation of our laws. Interpretation may be a little different, but if the disparity continues, a wider gap occurs and eventually becomes a conflict between the Appellate courts. We also get uncertainties and unfair discrepancies between the various circuits. The decision of the United States Court of Appeals for the Fifth Circuit has created a conflict and an unfair discrepancy with other circuit courts.

The United States Court of Appeals for the 5th Circuit improperly applied the law by attempting to balance the evidence submitted by the parties, crediting testimony by witnesses for the moving party over testimony from the nonmoving party and resolving disputes about what inferences should be drawn from the evidence. Therefore, this Court must grant cert in order to restore uniformity and to dispense with the unfair discrepancy.

Two questions are presented:

1. Did the United States court of appeals for the Fifth Circuit violate Sabzevari's right of a trial by jury as guaranteed by the 7th Amendment of the United States Constitution by violating Rule 56 and Rendering a decision that conflicts with decisions from the Supreme Court and decisions from other Circuit Courts?

2. Is the United States Court of Appeals for the Fifth Circuit's punishment of Sabzevari's mitigation efforts inconsistent with decisions from the Supreme Court by failing to take into account constructive discharge in its analysis?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 19

APPENDIX

Circuit Court Opinion 1a
District Court Opinion on Summary Judgment 11a
District Court Memorandum & Order 28a
Order Denying Petition for Rehearing 36a

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 90 S.Ct. 1598 (1970) 13, 14
Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986) i
Bailey v. Floyd County Bd. of Educ., 106 F.3d 135 (6th Cir. 1997) 14
Burlington Northern and Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006). ..... *passim*
Cadle Co. v. Hayes, III, 116 F.3d 957 (1st Cir. 1997) 8
Colon v. Coughlin, 58 F.3d 865 (2nd Cir. 1995) 14
Heiko v. Colombo Savings Bank, F.S.B., 434 F.3d 249 (4th Cir. 2006) 10
Hunt v. Cromartie, 526 U.S. 541 (1999) i
Hux v. City of Newport News, Virginia, 451 F.3d 311 (4th Cir. 2006) 11
Logan v. Commercial Union Insurance Company, 96 F.3d 971 (7th Cir. 1996) 8
MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996) 8
Midland Jud. Dist. Comm. Supervision & Corrs. Dept. v. Jones, 92 S.W.3d 486 (Tex. 2002) 16
Nichols v. Southern Illinois University-Edwardsville, 510 F.3d 772 (7th Cir. 2007) 11
Pennsylvnia State Police v. Suders, 124 S.Ct. 2342 (2004) 16, 17, 18, 19
Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000) 7
Schoonejongen v. Curtis-Wright Corp., 143 F.3d 120 (3rd Cir. 1998) 8
Wilkerson v. McCarthy, 336 U.S. 53 (1949). i
Williams v. Waste Management of Illinois, 361 F.3d 1021 (7th Cir. 2004) 18
Yerdon v. Henry, 91 F.3d 370 (2nd Cir. 1996) 8

STATUTES

28 U.S.C. §1254(1) 1
42 U.S.C. §2000(e) ..... *passim*

RULES

F.R.Civ.P. 56 ..... ii, 1, 7, 13

OTHER AUTHORITIES

John Adams, Novanglus Papers," no. 7.- *The Works of John Adams*, ed. Charles Francis Adams, vol. 4 (1851) i
Justice Sandra Day O'Connor, "How to Save our Courts", Parade, February 24, 2008 ..... i, 19

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unreported. The unreported opinion is attached in the appendix pages 1a-10a . Petitioner timely filed a request for Panel rehearing that was denied. The denial is included in the appendix at page 37a.

JURISDICTION

Under 28 U.S.C. §1254(1) this Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 31, 2008. A petition for panel rehearing was denied on February 26, 2008.

RELEVANT PROVISIONS INVOLVED

The applicable statute is Fed.Rev.Civ.Pro. 56 which says that judgment shall be granted only if there is not a "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The impacted constitutional right is under Amendment VII which states that "[i]n suits at common law...the right of trial by jury shall be preserved...."

STATEMENT

Sabzevari brought this action for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 USC §2000e, et seq. ("Title VII") alleging that Reliable discriminated against him based on national origin by promoting a less qualified white male to District Manager. Sabzevari further alleges that he was

retaliated against for raising complaints about Reliable's violations of Title VII and was ultimately terminated in violation of Title VII.

On June 15, 2006 the district court entered summary judgment in Reliable's favor holding that (1) Sabzevari's failure to promote claim was time barred. (A-17a); (2) Sabzevari's retaliation claim based on Reliable's failure to transfer him was not an adverse employment action. (A-20a); (3) There is not a causal connection between Sabzevari's termination and/or that Reliable had a legitimate non-retaliatory reason for the termination. (A-22a); (4) Sabzevari failed to exhaust his administrative remedies regarding any alleged constructive discharge claim. (A-25a); and (5) There is no evidence that Reliable acted with malice or reckless indifference to justify punitive damages and/or there being no viable claims left, the issue of punitive damages was moot. (A-25a).

On June 29, 2006, Sabzevari filed a motion to vacate based on the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co.* that was issued on June 22, 2006. 126 S.Ct 2405 (R. 636). On August 10, 2006, the district court granted in part and denied in part Sabzevari's motion to vacate (A-35a) but ultimately held that Reliable's denial of Sabzevari's transfer was a purely lateral transfer and therefore not a material adverse employment action. (A-32a).

The district judge's final decision was appealed and on January 31, 2008, the United States Court of Appeals for the Fifth Circuit affirmed, holding that (1) Sabzevari failed to raise a genuine issue of material fact to contradict Reliable's proffered evidence of a

legitimate non-discriminatory reason for Dixon's promotion to District Manager (A-6a); (2) Sabzevari presented no evidence that a transfer back to Austin was anything but a purely lateral transfer and therefore not an adverse employment decision. (A-7a); (3) Reliable's manager's verbal testimony was sufficient to establish a company policy that articulated a legitimate, nondiscriminatory reason for requiring Sabzevari to move. (A-9a); and (4) Sabzevari effectively quit by accepting alternate employment. (A-8a).

Facts

In September of 2000, a white male from Reliable's Beaumont office, Mr. Doug Dixon, was promoted to District Manager in Missouri. (R. 457). According to Mr. Grant Pillow, Appellee's Director of Agents and Sr. Vice President, a person is not qualified as a District Manager when they have a history of ethical violations, company rule violations or a lack of recruitment. (R. 501-3).

Starting in 1996, Mr. Dixon had a history of ethical violations, company rule violations and a lack of recruitment. (R. 513, 515 and 533). Sabzevari has had no such reprimands for ethical or company policy violations during his tenure with Reliable. Even when Sabzevari's recruitment was not up to his standard in the 2nd quarter of 2000, he still met the minimum/average requirement for recruitment. (R. 546 and 528-9). Sabzevari's recruitment was corrected the very next quarter. (R. 546). However, when Mr. Dixon was promoted to District Manager in October of 2000, he had already been put on notice that if his recruitment did not improve he would be placed on probation. (R. 535 and 537). Unlike

Mr. Dixon, Sabzevari did not have a history of recruiting problems.

According to Sabzevari's District Manager, the only reason Mr. Dixon was promoted to District Manager was because Reliable had more "white managers" working for them. (R. 457).

Due to the promotion of Mr. Dixon, Sabzevari began to raise issues with regard to company policy on the apparent lack of promotion of foreign race employees of the company. (R. 457). Sabzevari informed his co-workers and supervisors during meetings that he believed some of their actions regarding hiring and promotions to be in violation of Title VII policies and in direct violation of the company handbook. Id. After Sabzevari raised his Title VII complaints, Reliable began retaliating against him. Id. Sabzevari was labeled a troublemaker and other employees were told to stay away from him if they wanted to save their jobs. Id. Sabzevari was ostracized at work causing him a great deal of stress. Id. Mr. Sabzevari's evaluation also took a "suspicious" downward trend. (R. 531).

In October of 2000, Sabzevari became aware that a position was open in Austin. (R. 457). Sabzevari believed that a transfer back to Austin would provide him more job security and would remove him from the hostile environment he was being subjected to in Beaumont. Id. Sabzevari requested to transfer back to Austin as an assistant manager, which was initially approved. Id. However, in the fall of 2000, Reliable instituted an initiative to promote Hispanics and

African Americans over other races[1]. Id. Sabzevari was informed in early November 2000 that his transfer had been rescinded. Id.

When Mr. Sabzevari called to find out why his transfer was withdrawn, he was told by the regional manager, Mr. Mike Wheeler, that he "was a traitor because of [Sabzevari's] complaints about the way Reliable was conduct[ing] its business" and his career was threatened. (R. 458). Later in November of 2000, Sabzevari received a letter from management stating, for the first time, that he was in violation of company policy in that he was required to live within 25 miles of the district office. Id. In fact, other assistant managers were allowed to live over 25 miles from the district office. (Exhibit "A" to Appellant's Motion to Supplement the Record.) Nevertheless, Sabzevari was informed that he must move within 60 days or be immediately demoted to the status of agent. (R. 458). Sabzevari requested that Reliable suspend this action until the end of the school year for the benefit of his children but his request was denied. Id.

Sabzevari's work environment became so hostile and stressful that he sought medical help and was placed on medical leave by a physician. (R. 458).

On February 6, 2001, a letter outlining Sabzevari's complaints was forwarded to Reliable's

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[1] Reliable's discriminatory initiative led to other charges of discrimination and at least one (1) positive finding by the EEOC, which ultimately led to a consent decree signed by Judge Werlien in EEOC v. The Reliable Life Insurance Company, Civil Action No. H-03-01180.

Director of Human Resources. (R. 232). Reliable responded to the letter, completely ignoring Sabzevari's Title VII complaints. (R. 235). The undersigned replied to Reliable and, in an effort to resolve Sabzevari's complaints, reminded Reliable of Sabzevari's Title VII complaints and the need to resolve Reliable's violations so that Sabzevari could return to work. (R. 238).

On March 8, 2001, the undersigned notified Reliable that Sabzevari had been released to return to work and that he was ready, willing and able to return to work provided steps were taken to address Sabzevari's concerns that were detailed in the previous letters. (R. 241). On the same day, March 8, 2001, the undersigned received a letter from Reliable, which denied any knowledge of Sabzevari's complaints. (R. 243). On March 16, 2001, Sabzevari responded to Reliable's latest letter and advised Reliable that he was left with no choice but to file a complaint with the EEOC. (R. 246). On March 22, 2001, Reliable notified Sabzevari that effective March 8, 2001, his employment with Reliable was terminated. (R. 251).

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY AS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS VIOLATED SABZEVARI'S RIGHT OF A TRIAL BY JURY AS GUARANTEED BY THE 7TH AMENDMENT OF THE UNITED STATES CONSTITUTION BY VIOLATING RULE 56 AND RENDERING A DECISION THAT CONFLICTS WITH DECISIONS FROM THE SUPREME COURT AND DECISIONS FROM OTHER APPELLATE COURTS

A. In determining whether to grant Summary Judgment as a matter of law under Fed.R.Civ.P. 56, should a District Judge and/or an Appellate Judge interpret conflicting facts in the light most favorable to the nonmoving party?

Approximately eight years ago, in another case from the United States Court of Appeals for the Fifth Circuit, this Court reiterated the long standing rule that courts "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2110 (2000). In the Reeves case, the United States Court of Appeals for the Fifth Circuit overtly weighed the evidence and determined that the evidence was insufficient to support the jury's findings. Id. at 2111. In the case at bar, the United States Court of Appeals for the Fifth Circuit covertly weighed the evidence by ignoring the evidence that supported the nonmovant's claims. It does not matter whether the court weighs the evidence overtly or covertly - the

result is the same. Factual disputes are being improperly taken away from juries, which violates the 7th Amendment and conflicts with rulings from other Circuit Courts. See *Schoonejongen v. Curtis-Wright Corp.*, 143 F.3d 120, 143 (3rd Cir. 1998)(When a material fact cannot be resolved without weighing the credibility of a witness, summary judgment is improper.); *Cadle Co. v. Hayes, III,* 116 F.3d 957, 960 (1st Cir. 1997)(Summary judgment is proper only if without regard to credibility determinations, reveals no genuine issue as to any material fact.); *Logan v. Commercial Union Insurance Company*, 96 F.3d 971, 978 (7th Cir. 1996)(Consider all facts in the light most favorable for nonmovant, resolving all inferences in his favor.); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996)(View all evidence and draw any inferences thereform in the light most favorable to the nonmoving party.); and *Yerdon v. Henry*, 91 F.3d 370, 375 (2nd Cir. 1996)(When genuine factual issues can be resolved in favor of either party, summary judgment is improper.).

In its opinion, the United States Court of Appeals for the Fifth Circuit stated that "Sabzevari has pointed to no company policy or past promotional decision to support the conclusion that these [the Dixon reprimands] should have disqualified Dixon." (A-5a). Later in the opinion the Panel states that it is unnecessary to have a policy in writing for it to be in place. (A-9a).

However, Sabzevari pointed to the testimony of Mr. Grant Pillow, Reliable's Director of Agents and Sr. Vice President, who stated that he would not want a person as a District Manager that had a history of ethical violations, company rule violations or a lack of

recruitment. (R. 501-3). If the Director of Agents and Sr. Vice President for Reliable is not sufficient to testify about qualifications and company policy, then who is? Furthermore, Mr. Pillow did not place a limit on when the ethical and company rule violations and lack of recruitment occurred[2].

B. Under the Civil Right Act of 1964, is a summary judgment proper when a jury could infer from the evidence that a parties Title VII rights were violated?

Applying the law to these facts, could a reasonable jury conclude that based on the testimony from Reliable's director of Agents and Sr. Vice President, a person with a history of ethical violations and company rule violations is automatically disqualified from being a district manager? Especially considering that at the time of the promotion, Mr. Dixon was on the verge of being placed on probation for recruitment violations. If the answer is yes, then this Court must reverse the lower court's decision and remand this case for a trial on its merits.

Contrary to the finding by the United States Court of Appeals for the Fifth Circuit, Sabzevari and Dixon did not have identical scores on recruiting evaluations in the period immediately proceeding Mr. Dixon's promotion. Mr. Dixon had problems with recruiting for ALL of 2000. (R.533). In fact, when Mr. Dixon was promoted to District Manager in October of

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[2] If the violations of Mr. Dixon going back four years were not a disqualifying event, then Reliable should have presented evidence that would support this argument.

2000, he had already been put on notice that if his recruitment did not improve he would be placed on probation. (R. 535 and 537). On the other hand, Sabzevari only had an issue in the 2nd quarter of 2000 and while Sabzevari's recruitment was not up to his standard, he still met the minimum/average requirement for recruitment. (R. 546 and 528-9). According to Mr. Pillow, Mr. Sabzevari was more qualified for the District Managers position since he did not have a history of recruiting problems like Mr. Dixon.

To find that Mr. Dixon and Mr. Sabzevari had the same evaluations immediately proceeding the promotion overlooks the evidence that, according to Mr. Mike Wheeler, the regional manager over Sabzevari's district, Sabzevari's decrease in ratings was suspicious and should have been investigated. (R. 531). In fact, the suspicious decrease in Mr. Sabzevari's evaluations occurred in the period of time that he was complaining about Reliable's improper employment practices and that Mr. Dixon was offered the promotion to District Manager. The reasonable inference is that there is a relationship between the decrease in ratings and Mr. Sabzevari's complaints.

Further justification for a jury to reasonably infer that Reliable's promotion decision was discriminatory comes from Sabzevari's District Manager, who confirmed that the only reason Mr. Dixon was promoted to District Manager was because Reliable had more "white managers" working for them. (R. 457).

An employee can prove a failure to promote claim by either the direct method, that racial discrimination motivated the employment decision, or

by the indirect burden-shifting method. *Nichols v. Southern Illinois University-Edwardsville*, 510 F.3d 772, 783 (7th Cir. 2007). Under the burden-shifting method, an employee can "prove pretext by showing that [he] was better qualified or by amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reason." *Hux v. City of Newport News, Virginia*, 451 F.3d 311, 315 (4th Cir. 2006) quoting *Heiko v. Colombo Savings Bank, F.S.B.*, 434 F.3d 249, 259 (4th Cir. 2006). The first test requires a comparison of the candidates. The second test does not necessarily require a comparison of the candidates. For instance, if a position required a four-year degree, and the person who received the position, over a degreed minority, did not have a degree, is there any need to compare qualifications beyond the degree qualifications? The current case is no different. The Vice President in charge of agents testified that he would not want a District Manager who had; i) ethical violations; ii) company rule violations; or iii) a history of recruitment problems. Mr. Dixon had all three and Sabzevari had none.

The foregoing facts show that there is sufficient evidence that a jury could infer that Reliable violated Title VII by promoting Mr. Dixon over Sabzevari.

C. Under Burlington Northern, did the Supreme Court determine that whether an act is an adverse employment action is an objective standard that depends on the particular facts of the case and therefore, should be left up to the trier of fact to determine if the employment action was adverse?

In Burlington, the Supreme Court held that whether a particular act is an adverse employment action depends on the circumstance. *Burlington Northern*, 126 S.Ct. @ 2415. The Supreme Court emphasized the importance of a "reasonable employee standard" in order to avoid "the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." Id.

In the current case, a reasonable jury could infer that Sabzevari suffered an adverse employment action when Reliable approved and then withdrew Sabzevari's transfer request. Sabzevari requested a transfer back to Austin because he believed that the transfer would provide him more job security and would remove him from the hostile environment he was being subjected to in Beaumont. (R. 457). After Sabzevari raised his Title VII complaints, Sabzevari was labeled a troublemaker and other employees were told to stay away from him if they wanted to save their jobs. (R. 457). Mr. Sabzevari's evaluation also took a "suspicious" downward trend. Furthermore, after the transfer approval was withdrawn, Sabzevari was told by Mr. Wheeler that he "was a traitor because of [Sabzevari's] complaints about the way Reliable was conduct[ing] its business" and Mr. Wheeler threatened Sabzevari's career. (R. 458). Then, for the first time, Sabzevari was told to move within the district or be demoted. Id.

The reasonable inference is that Sabzevari's belief that Austin would provide him more job security and remove him from the hostile environment turned out to be true. Mr. Sabzevari was told his transfer was denied because he was a traitor. Mr. Sabzevari was then forced to choose between a demotion at work or uprooting his family.

The Supreme Court found that Title VII's anti-retaliation provisions protect employees from retaliation that produces an injury or harm. *Burlington Northern*, 126 S.Ct @ 2114. What can be more harmful than being forced to choose between a demotion or uprooting your family. Reliable retaliated against Sabzevari by creating a hostile environment, withdrawing his transfer and ordering him to move, all of which would discourage a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern*, 126 S.Ct at 2415. Whether the foregoing evidence establishes an adverse employment action under the circumstances of the case at bar should have been left to the trier of fact. Id. @ 2415.

D. Under the Civil Rights Act of 1964, is it sufficient for a party to deny that an oral statement was made in order to defeat a summary judgment?

Once a party has moved for summary judgment by submitting evidence on a material fact, in order to create a genuine issue the nonmovant must submit contrary evidence in the form of affidavits, deposition testimony, or other admissible documents. Fed.R.Civ.Pro. Rule 56 and see *Adickes v. S.H. Kress & Co.*, 90 S.Ct. 1598, 1610 (1970).

In the current case, one of the adverse employment actions alleged by Sabzevari is that after complaining about potential violations of Title VII, he was ordered to move within the district or face a demotion. The United States Court of Appeals for the Fifth Circuit dismissed this as an adverse employment action based on the premise that it was a long standing rule for "district managers to live within their districts." (A-8a thru 9a). First, Mr. Sabzevari was NOT a district manager but an assistant manager. Second, there was no written policy[3] regarding district or assistant managers living within the district. Third, other assistant managers were allowed to live outside their district and not face demotion. (Exhibit "A" to Appellant's Motion to Supplement the Record.). Finally, there is a dispute about whether Sabzevari was ever informed about the purported policy BEFORE his Title complaints.

Without any written documentation, Reliable is relying on testimony to establish the policy and the fact that Sabzevari was informed that he needed to live within the district before he complained about Reliable's Title VII violations. However, Sabzevari submitted an affidavit denying that he was ever told about the company's alleged policy regarding Assistant Managers living within their district. Therefore, Sabzevari is entitled to the benefit of the doubt on his claim that the first time this policy was raised was after Sabzevari started complaining about Reliable's discriminatory practices. *Adickes*, 90 S.Ct. @ 1608; *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997) and *Colon v. Coughlin*, 58 F.3d 865, 872

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[3] The policy was "proven" by the oral testimony of Reliable's witnesses.

(2nd Cir. 1995). Contrary to Reliable's claims, Mr. Hirschfeld, Sabzevari's previous regional manager and the one that requested he transfer to Beaumont, never mentioned anything about Sabzevari having to move to Beaumont. (R. 458). Mr. Hirschfeld did comment, however, that it would be nice for Sabzevari and his wife to be able to live in their League City home while Sabzevari was working in Beaumont. (R. 475).

Without any supporting documentation to support Reliable's position, the United States Court of Appeals for the Fifth Circuit is taking as true the testimony of Reliable's witnesses over Sabzevari's denial. A reasonable jury could believe Sabzevari, especially considering other Assistant Managers were permitted to live outside their district. Furthermore, lets not forget that Reliable requested for Sabzevari to transfer to Beaumont. (R. 456). Part of the benefit for Sabzevari to transfer to Beaumont was that Sabzevari and his family would be able to live in their League City home. (R. 475).

The United States Court of Appeals for the Fifth Circuit also overlooked and/or misapprehended that prior to Sabzevari's complaints about Reliable's improper employment practices, there was never any mention to Sabzevari that he was required to "live within the district boundaries and no more than approximately 25 miles from the district office." (R. 228 & 229). Whether Reliable retaliated against Sabzevari by demanding that he live within the district when other assistant managers were not required to live within the district, is a fact question that should be left to the trier of fact.

II. REVIEW IS WARRANTED SINCE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S PUNISHMENT OF SABZEVARI'S MITIGATION EFFORTS IS INCONSISTENT WITH DECISIONS FROM THE SUPREME COURT BY FAILING TO TAKE INTO ACCOUNT CONSTRUCTIVE DISCHARGE IN ITS ANALYSIS.

A. Under Title VII, when an employee mitigates their damages by accepting another position, does that preclude a wrongful termination as a matter of law?

On March 8, 2001, Sabzevari was released to return to work. He made it clear to Reliable that he was ready willing and able to return to work provided his Title VII complaints were addressed. (R. 232). Since Reliable completely ignored his complaints, in an effort to mitigate his damages Sabzevari began alternate employment after he was released to return to work. On March 22, 2001, Reliable terminated his employment.

The United States Court of Appeals for the Fifth Circuit agreed with Reliable that Sabzevari "effectively quit" when he accepted alternate employment. (A-8a). However, Texas is an employment-at-will state. *Midland Jud. Dist. Comm. Supervision & Corrs. Dept. v. Jones*, 92 S.W.3d 486, 487 (Tex. 2002). In the case at bar, there is no evidence that Sabzevari was precluded from returning to Reliable if it had addressed his concerns that were detailed in his February 2001 letter. (R. 232). Sabzevari has a duty to mitigate his damages under Title VII. Sabzevari mitigated his damages by

locating alternative employment that began after he was released to return to work. By finding that Sabzevari effectively quit because he accepted alternate employment ignores the fact that all the documentation establishes that Mr. Sabzevari, as of March 8, 2001, was ready, willing and able to return to work for Reliable, if Reliable addressed his concerns. (R. 241).

The United States Court of Appeals for the Fifth Circuit sets up a very problematic standard. Taking the court's holding to its logical conclusion, if a person "effectively quits" there can't be a wrongful discharge claim even if the employee was constructively discharged. The holding contradicts the constructive discharge doctrine, which has been "solidly established" in the federal courts when Title VII was enacted in 1964. *Pennsylvnia State Police v. Suders*, 124 S.Ct. 2342, 2351 (2004).

B. If it is determined that an employee "effectively quit," must the court still consider whether the employee was constructively discharged?

Constructive discharge occurs when an employer creates such a hostile environment that no reasonable person would continue working in such conditions. *Pennsylvnia State Police*, 124 S.Ct. @ 2351. In the case at bar, after raising his Title VII complaints, Reliable retaliated against Sabzevari by: (i) labeling him a troublemaker; (ii) telling other employees to stay away from him if they wanted to save their jobs; (iii) an evaluation taking a "suspicious" downward trend; (iv) withdrawing a transfer because Sabzevari was a "traitor" due to his Title VII complaints; (v) threatening his career; and (vi) telling Sabzevari for the

first time to move within the district or be demoted. The environment became so hostile that it impacted Sabzevari's health and his doctor placed him on medical leave. The foregoing facts can and do establish a working environment so hostile that no reasonable person would keep working for Reliable. See *Williams v. Waste Management of Illinois*, 361 F.3d 1021, 1032 (7th Cir. 2004)(Facts proving constructive discharge can consist of "subjecting an employee to a humiliating, degrading, unsafe, unhealthful or otherwise significantly negative workplace environment not present before the complaint.").

When Reliable was notified of Sabzevari's complaints in writing, the complaints were completely ignored and later, Reliable denied ever knowing about the Title VII complaints. Based on the foregoing, a reasonable jury could infer that no reasonable person would continue working in such conditions. The uncontroverted facts in the current case are that Sabzevari was terminated for not returning to work, and Sabzevari was ready willing and able to return to work provided Reliable addressed his Title VII complaints. To the extent that a trier of fact could infer that Sabzevari quit, then you must consider whether it was a constructive discharge. However, the United States Court of Appeals for the Fifth Circuit stopped its determination once it found that Sabzevari quit based on his acceptance of another position.

In the current case, if Sabzevari "effectively quit" by accepting alternate employment instead of being fired[4] the court must address whether a

[4] If Sabzevari was fired, the burden shifting rules would apply and

constructive discharge case would support Sabzevari's wrongful termination claim. *Pennsylvnia State Police*, 124 S.Ct. @ 2351.

According to Justice Sandra Day O'Connor, our laws are "threatened when judges ignore settled law and make decisions according to personal or public preferences." Justice Sandra Day O'Connor, "How to Save our Courts", Parade, February 24, 2008. When a court improperly applies the law, the decision should be reviewed and, if it is incorrect, the decision should be overturned. Id.

CONCLUSION

In light of this Court's decision in *Reeves v. Sanderson Plumbing* and *Pennsylvnia State Police*, and for all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant certiorari, vacate the decision of the United States Court for the Fifth Circuit, remand this matter to the District Court for a trial on the merits and for such other and further relief that petitioner may be entitled.

Respectfully submitted,
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he would have to prove that Reliable's proffered reason was merely pre-textual. If Sabzevari quit, then the court would have to apply the constructive discharge analysis.

(footnotes trail end of each document)

No. 06-20888

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEHRDAD SABZEVARI,
Plaintiff-Appellant

v.

THE RELIABLE LIFE INSURANCE COMPANY,
Defendant-Appellee

January 31, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For MEHRDAD SABZEVARI, Plaintiff - Appellant: Stephen Joseph Schechter, Seabrook, TX.

For RELIABLE LIFE INSURANCE CO, Defendant - Appellee: G Mark Jodon, Allan Huddleston Neighbors, Littler Mendelson, Houston, TX.

JUDGES: Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

OPINION

PER CURIAM: *

Mehrdad Sabzevari ("Sabzevari") appeals the district court's grant of summary judgment dismissing his Title VII claims against The Reliable Insurance Company ("Reliable"). We AFFIRM.

I. BACKGROUND

Sabzevari worked for Reliable as an assistant manager in the Beaumont district office. In September 2000, Reliable promoted Doug Dixon, a white assistant manager in the Beaumont office, to district manager of the Sikeston, Missouri office. At the meeting announcing Dixon's promotion, Sabzevari declared that he was denied the promotion because of his Iranian national origin. Sabzevari also informed his co-workers and supervisors that he believed the company's failure to promote "foreign race" employees violated Title VII. Sabzevari alleges that after he questioned Reliable's promotion practices, his work environment became so hostile that his doctor placed him on medical leave.

While on medical leave, Sabzevari applied for employment with American National Insurance Company ("American National"). On March 8, 2001, Sabzevari's doctor released him to return to work without restriction. According to Sabzevari, he did not return to work at that time because Reliable still had not addressed his Title VII concerns. On March 15, 2001, Sabzevari filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging national origin discrimination and retaliation.

On March 19, 2001, Sabzevari accepted employment with American National. Three days later, Reliable

sent Sabzevari a letter terminating his employment because he had failed to return to work after obtaining a medical release. In August 2002, Sabzevari amended his 2001 EEOC charge to add the claim that Reliable failed to promote him because of his national origin.

Sabzevari filed this lawsuit in August 2003, claiming that Reliable violated Title VII by failing to promote him because of his national origin and by retaliating against him after he expressed opposition to the company's employment practices. He also asserted that he was entitled to punitive damages as a result of these violations. Reliable moved for summary judgment on all of Sabzevari's claims, and the district court granted the motion.

II. STANDARD OF REVIEW

This court reviews a grant of summary judgement *de novo*, applying the same legal standard as the district court. *Chacko v. Sabre, Inc.*, 473 F.3d 604, 609 (5th Cir. 2006). Summary judgment is appropriate when the evidence demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. DISCUSSION

Sabzevari argues that the district court erred in granting summary judgment on his failure-to-promote claim, his retaliation claim, and his claim for punitive damages.

Sabzevari first asserts that Reliable discriminated

against him by denying him the promotion that it awarded to Doug Dixon. In granting summary judgment on this claim, the district court reasoned that Sabzevari did not amend his charge to include the failure-to-promote allegation until August 2002. Accordingly, the district court concluded that the allegation was not timely filed with the EEOC, and that Sabzevari had not exhausted his administrative remedies for the failure-to-promote claim. On appeal, Sabzevari argues that the original charge he filed with the EEOC was sufficient to exhaust his administrative remedies.

We need not decide this issue. Even if we assume that Sabzevari has exhausted his administrative remedies, summary judgment on the failure-topromote claim is proper because Reliable has articulated a legitimate, nondiscriminatory reason for promoting Dixon, and Sabzevari has failed to raise a genuine issue of material fact as to whether this reason is a pretext for discrimination.

To survive summary judgment, a plaintiff must satisfy the burden-shifting test found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Septimus v. Univ. of Houston*, 399 F.3d 601, 609 (5th Cir. 2005) (citing *McDonnell Douglas*). Under this test, a plaintiff must first establish a prima facie case of discrimination. *Id.* The burden then shifts to the defendant to set forth a legitimate, nondiscriminatory eason for its decision. *Id.* "The defendant's burden during this second step is satisfied by producing evidence, which, '*taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action.'" *Price*

v. Fed. Express Corp., 283 F.3d 715, 720 (5th Cir. 2002) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). Selection of a more qualified applicant is a legitimate and nondiscriminatory reason for preferring one candidate over another. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 251-253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the defendant produces a legitimate reason, any presumption of discrimination raised by the plaintiff's prima facie case vanishes. *Septimus*, 399 F.3d at 609. However, the plaintiff may still avoid summary judgment by demonstrating a genuine issue of material fact as to whether the legitimate reasons proffered by the defendant are a pretext for discrimination. *Id.*

Reliable articulated a legitimate, nondiscriminatory reason for promoting Dixon to the district manager position: selection of the most qualified candidate. Thus, the burden shifts to Sabzevari to show pretext. Sabzevari attempts to do so in two ways. First, he argues that Dixon was not qualified for the promotion because Dixon received two reprimands: one more than two years before the promotion for not submitting a specific application to the home office, and one nearly five years before the promotion for an unspecified infraction of the company's underwriting rules. However, Sabzevari has pointed to no company policy or past promotional decision to support the conclusion that these reprimands should have disqualified Dixon.

Second, Sabzevari attempts to establish pretext by arguing that he was more qualified for promotion than Dixon. For Sabzevari to establish pretext in this way, he must raise a fact issue as to whether he was "clearly

better qualified" and not merely "similarly qualified." *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993). Sabzevari argues that he is clearly better qualified because Dixon had problems recruiting other employees. However, the summary judgment evidence demonstrates that Dixon and Sabzevari earned identical scores on recruiting evaluations in the period immediately preceding the promotion. Moreover, recruiting is only one criterion among many that Reliable considers when promoting district manager candidates. Even if Sabzevari established that he had superior recruiting skills, this would not raise an issue as to whether he was "clearly better qualified" on the whole. Because Reliable articulated a legitimate, nondiscriminatory reason for promoting Dixon, and Sabzevari has failed to raise a genuine issue of material fact as to whether this reason was pretextual, this claim need not be tried.

Sabzevari also argues that Reliable retaliated against him, after he reported his concerns that the company's employment practices violated Title VII, by: (1) denying him a transfer to the Austin office, (2) terminating him, and (3) creating a hostile work environment.

A prima facie claim of retaliation has three elements: (1) the employee engaged in a protected activity, (2) the employer took adverse action against the employee, and (3) a causal connection exists between the protected activity and the adverse employment action. *See Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 330, 122 Fed. Appx. 734 (5th Cir. 2004). An adverse employment action is one that a reasonable employee would find to be "materially adverse," *i.e.*, one that

might "dissuade a reasonable worker from making or supporting a charge of discrimination" under Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006) (internal quotations omitted).

First, Sabzevari argues that Reliable retaliated by denying him a transfer from the assistant manager position in Beaumont to the assistant manager position in Austin. Reliable counters that denial of a lateral transfer, such as the one Sabzevari sought, cannot constitute an adverse employment action. The Supreme Court recently adopted the "materially adverse" standard for determining whether an action constitutes an adverse employment action. *See id.* Under the "materially adverse" standard, "a transfer that does not involve a demotion in form or substance cannot rise to the level of a materially adverse employment action." *Brown v. Brody*, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999) (quoting *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997)); *see also Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 900 (7th Cir. 2003). Sabzevari presented no evidence that a transfer from the assistant manager position in Beaumont to the assistant manager position in Austin was anything but a lateral transfer in terms of pay, promotional opportunities, working conditions, and other objective factors. Therefore, denial of the lateral transfer from Beaumont to Austin is not a materially adverse employment action, and cannot support Sabzevari's retaliation claim.

Second, Sabzevari argues that Reliable retaliated against him by terminating his employment. Reliable

disagrees that it terminated Sabzevari, arguing that Sabzevari "effectively quit" when he accepted employment with American National. We agree. Sabzevari failed to return to work after he received his medical release. In addition, he accepted employment with American National before Reliable terminated him. In light of this evidence, Sabzevari has failed to show that Reliable would not have terminated him "but for" his opposition to the company's employment practices.

Third, Sabzevari contends that Reliable retaliated against him by creating a hostile work environment. Specifically, Sabzevari alleges that Reliable demanded that he move within the twenty-five miles of the Beaumont district office. Reliable argues that the company had a longstanding rule that required all district managers to live within their districts and asserts that it would have invoked this rule even if Sabzevari had not engaged in protected activity. Reliable offered evidence that such a rule was in place long before Sabzevari began to work for the company in Beaumont, and that the rule applied to all district managers. The company also submitted evidence that all other managers in the Beaumont district lived within its boundaries, and that it had asked Sabzevari to move within the Beaumont district on multiple occasions before he ever voiced Title VII concerns.

Sabzevari counters that Reliable created this rule to harass him and that it applied the rule only to him. To support this claim, he offered evidence that the rule was not a part of any written policy. Sabzevari also argues that Reliable cannot cite any documentation to support the contention that its managers instructed

him to move before he raised Title VII concerns. However, the fact that the policy was unwritten does not refute the testimony of Reliable's managers that such a policy was actually in place. Furthermore, the fact that Reliable cannot produce documentation that it instructed Sabzevari to move before his complaints does not defeat the testimony of multiple Reliable employees that the company indeed issued such instructions. Accordingly, Reliable has articulated a legitimate, nondiscriminatory reason for requiring Sabzevari to move, and Sabzevari has not raised a genuine issue of material fact as to whether this reason was a pretext for retaliation.

Sabzevari also alleges that Reliable created a hostile work environment by labeling him a troublemaker and a traitor and by ostracizing him. But Sabzevari fails to substantiate these claims with any evidence. Such conclusory assertions are not sufficient to stave off summary judgment. *See Douglass v. United Servs. Auto Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995). For these reasons, we affirm the district court's grant of summary judgment on Sabzevari's retaliation claims.

Finally, Sabzevari contends that the district court improperly dismissed his claim for punitive damages. Because we affirm the dismissal of Sabzevari's Title VII claims, his argument that he is entitled to punitive damages as a result of these claims also must fail.

IV. CONCLUSION

For these reasons, we AFFIRM the district court's grant of summary judgment in favor of Reliable.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CIVIL ACTION H-03-3240

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MEHRDAD SABZEVARI, Plaintiff, vs. THE RELIABLE LIFE INSURANCE CO., Defendant.

June 15, 2006, Decided
June 15, 2006, Filed

COUNSEL: For Mehrdad Sabzevari, Plaintiff: Stephen J Schechter, Attorney at Law, Seabrook, TX.

For The Reliable Life Insurance Company, Defendant: G Mark Jodon, Littler Mendelson, Houston, TX; Allan Huddleston Neighbors, IV, Littler Mendelson PC, Houston, TX.

JUDGES: Gray H. Miller, United States District Judge.

OPINION BY: Gray H. Miller

OPINION

OPINION ON SUMMARY JUDGMENT

In this Title VII suit, plaintiff Mehrdad "Mike" Sabzevari contends The Reliable Life Insurance Company (Reliable), his former employer, discriminated against him due to his Iranian national origin. He alleges Reliable failed to promote him from assistant to district manager, and retaliated against

him for engaging in activity protected under Title VII of the Civil Rights Act of 1964. Reliable seeks summary judgment on all claims (Dkt. 28). For the reasons that follow, Reliable's motion is granted.

Background

Sabzevari began his employment with Reliable in 1993, as an insurance agent. In August 1996 Sabzevari was promoted to assistant manager. In August 1999, he transferred at the request of the company from Austin to Beaumont. Sabzevari claims that in January 2000, he expressed his interest in promotion and advancement to his manager. He was concerned openings were available that he was not being informed about nor given the opportunity to apply for. In September 2000, Reliable promoted Doug Dixon, another assistant manager in the Beaumont office, to district manager in its Sikeston, Missouri office. Dixon is a white male. Sabzevari maintains this position was filled without his knowledge and he was not given an opportunity to apply.

The plaintiff states that in August and September 2000, he informed his co-workers and supervisors of his belief that the company's failure to promote "foreign race" employees violated Title VII and the company's handbook. At the September 2000 district office meeting announcing the Dixon promotion, Sabzevari protested that he was not promoted because of his race. Sabzevari asserts this questioning of Reliable's "practices regarding promotion and insurance agent hiring criteria" led to retaliation from Reliable.[1] First, Sabzevari claims that his transfer request back to Austin in October 2000 was denied, even though a

similar prior request in June had been approved. (Sabzevari at first accepted the June transfer but then declined for financial reasons.)

Second, in November 2000, Reliable told Sabzevari that he was required to live within twenty-five miles of its Beaumont office and that he had sixty days to relocate. Sabzevari asked the relocation be put off until the end of school year so as not to disrupt the education of his children. Sabzevari further states that his work environment became so hostile at this point that he was placed on medical leave by his treating physician, Dr. Vijesh Patel, in January 2001. On March 8, 2001, Dr. Patel released Sabzevari to return to work without restriction.

Sabzevari did not return to work at this time, because he sought certain conditions -- that his Title VII concerns be addressed by the company and that he be transferred to Austin.[2] On March 22, 2001, Reliable sent a letter terminating the plaintiff's employment "as of March 8, 2001" for not returning to work after being released by his doctor.[3] Reliable, however, contends Sabzevari actually quit his job before receiving this letter by taking employment with American National Insurance Company. While Sabzevari was on medical leave, he applied for employment with American National on January 9, 2001. On March 19, 2001, three days before the termination letter was sent, Sabzevari signed an employment agreement with American National. The March 30th American National payroll records indicate he had been on their payroll for the prior two weeks.[4]

Sabzevari filed a charge of discrimination with the Equal Employment Opportunity Commission on March

15, 2001, and an amended charge of discrimination on August 29, 2002. The 2001 charge alleged national origin discrimination and retaliation for Reliable's refusal to transfer Sabzevari to Austin and its insistence he relocate to within twenty-five miles of the Beaumont district office.[5] The August 25, 2002 charge added the claim that Reliable failed to promote Sabzevari because of his national origin.[6]

Legal Standards

Reliable seeks summary judgment on all of Sabzevari's claims. Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party moving for summary judgment must demonstrate that there are no genuine issues of material fact. *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005). An issue is "material" if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248.

In responding to a properly supported summary judgment motion, the non-movant cannot merely rely on its pleadings, but must present specific and supported material facts, of significant probative value, to preclude summary judgment. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,

586 n.11, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 309 (5th Cir. 2005). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255; *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332 (5th Cir. 2005).

Analysis

Reliable's grounds for summary judgment on the failure to promote claim are: (1) this allegation was not timely filed with the EEOC and Sabzevari therefore did not exhaust his administrative remedies; (2) Sabzevari cannot establish a prima facie case because he did not actually apply for the district manager position; (3) Reliable has a legitimate, non-discriminatory explanation in that Dixon was more qualified for the district manager position than Sabzevari; (4) Reliable is entitled to the favorable "same actor" inference because the same person who hired and promoted Sabzevari to assistant manager made the decision about Dixon's promotion to district manager. Reliable maintains that it is entitled to judgment as a matter of law on Sabzevari's retaliation claim because he did not suffer an adverse employment action.

1. Failure to Promote

Sabzevari alleges Reliable failed to promote him in September or October 2000 due to discriminatory and retaliatory animus. He amended his EEOC charge to include this act in August 2002, more than 300 hundred

days later. It is therefore time barred, and the court cannot consider it.

A plaintiff must exhaust his administrative remedies by a filing a charge of discrimination with the EEOC prior to seeking judicial relief. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995).[7] Under Title VII, a plaintiff "shall" file an employment discrimination charge with the EEOC either 180 or 300 days after an "alleged unlawful employment practice occurred." *See* 42 U.S.C. § 2000e-5(e)(1); *see also National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109-10, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002).[8] A claim is time barred if not filed within these time limits. *National R.R.*, 536 U.S. at 109. Generally the limitations period begins on the date that the discriminatory act occurred, and a plaintiff cannot sustain his claims based on incidents occurring before the 300 day period. *See National R.R.*, 536 U.S. at 113; *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). Despite not being a jurisdictional prerequisite to filing suit, this is a statutory precondition to maintenance of any action under Title VII. 42 U.S.C. § 2000e-5(e); *National R.R.*, 536 U.S. at 113.

Sabzevari argues that Reliable should be equitably estopped from asserting the time-bar because it knew about his claim of failure to promote and addressed it in its position statement to the EEOC. The timeliness requirement is in fact subject to equitable exceptions. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982). Under the equitable estoppel doctrine invoked by Sabzevari, an employer is estopped from relying on the filing periods if the employer misrepresented or concealed facts

necessary to support a discrimination charge and thereby caused the plaintiff not to assert his rights within the limitations period. *See Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878-79 (5th Cir. 1991), *cert. denied*, 502 U.S. 868, 112 S. Ct. 198, 116 L. Ed. 2d 158 (1991). The plaintiff has the burden of proving this form of estoppel. *Id.* at 879.

Here there is no allegation Reliable concealed facts or misled Sabzevari causing him not to timely file his claim of failure to promote. As evidenced by his protestations at the district office meeting, Sabzevari was immediately aware that he had not been promoted. Nor has Sabzevari offered any other persuasive reason why the filing deadline should be equitably extended in this case. The Supreme Court has instructed that equitable doctrines are to be "applied sparingly" when altering the time period for filing an employment discrimination charge. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). With this in mind, the court finds that Sabzevari has not carried his burden of demonstrating that an equitable waiver of the time requirement is applicable.[9]

Sabzevari's untimely filing precludes his claim of failure to promote, and Reliable is entitled to judgment as a matter of law on this cause of action.

2. Retaliation

Turning next to Sabzevari's cause of action for retaliation, Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful

employment practice by this subchapter, or because he had made a charge ... under this subchapter." 42 U.S.C. § 2000e-3(a). A retaliation claim has three elements: (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action. *Hockman v. Westward Commc'ns LLC*, 407 F.3d 317, 330, 122 Fed. Appx. 734 (5th Cir. 2004); *Walker v. Thompson*, 214 F.3d 615, 628-29 (5th Cir. 2000). An employee has engaged in activity protected by Title VII if he has either (1) "opposed any practice made an unlawful employment practice" by Title VII, or (2) "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a); *Grimes v. Texas Dep't of Mental Health & Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996).

Sabzevari complains Reliable retaliated against him with respect to two discrete employment actions: (i) the denial of the Austin transfer, and (ii) the termination of his employment.[10]

(i) Denial of Transfer

Reliable does not contest that Sabzevari satisfies the first element of retaliation. Under Title VII's "opposition clause," an employee meets this threshold if he has a reasonable belief that his employer engaged in unlawful employment practices. *See Long v. Eastfield Coll.*, 88 F.3d 300, 305 (5th Cir. 1996).

Reliable does dispute that Sabzevari has established the second and third elements of retaliation, denying

that it took an adverse employment action against Sabzevari, or that there was any causal connection between the purported adverse actions and his raising concerns about Reliable's promotion practices.

An employment decision is only adverse where it is an "ultimate employment decision." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997). The denial of the transfer request to Austin was clearly not an ultimate employment decision under Fifth Circuit precedent. *See, e.g., Burger v. Central Apartment Mgmt., Inc.*, 168 F.3d 875, 879 (5th Cir. 1999) ("[r]efusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision"); *see also Wakefield v. State Farm Ins.*, 229 F.3d 1148 (5th Cir. 2000) (unpublished table decision) (an opportunity to be reviewed for a promotion or a lateral move are not ultimate employment decisions); *see generally Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 532 n.2 (5th Cir. 2003) (per curiam) (cataloguing the Fifth Circuit's taxonomy of "ultimate employment decisions"). Nearly every other circuit has likewise held that a lateral transfer does not amount to an adverse employment decision,[11] with this explanation coming from the Seventh Circuit:

> Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial

> personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (emphasis in original) (citations omitted).

Sabzevari argues the Austin transfer would not have been a purely lateral transfer because it would have "provide[d] him a more secure future and one free of harassment."[12] This is unpersuasive for several reasons. First, no summary judgment evidence is provided in support of this assertion. *Cf. Wakefield*, 229 F.3d 1148. Second, employment actions are adverse only where pay, benefits or level of responsibility are affected. *See Pegram v. Honeywell, Inc.*, 361 F.3d 272, 282 (5th Cir. 2004); *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003), *cert. denied*, 540 U.S. 817, 124 S. Ct. 82, 157 L. Ed. 2d 34 (2003). Sabzevari was seeking transfer from an assistant manager position in Beaumont to an assistant manager position in Austin. He has offered no proof that this transfer would have resulted in different pay, benefits, or level of responsibility. Third, presumably most employees who seek a transfer do so because they believe it will help secure their future or place them in a better work environment. But this subjective expectation by itself does not affect whether a transfer is "lateral" or not.

(ii) Termination

Turning next to the purported retaliatory termination, there are several difficulties with this claim. First, the summary judgment evidence suggests that Sabzevari terminated the employment relationship before

Reliable did. While Sabzevari's termination was effective March 8, 2001, Reliable's decision was announced on March 22, 2001. As of that date, Sabzevari had effectively resigned from Reliable by taking a position with another company (as of at least March 19, 2001).

Assuming *arguendo* that the employment relationship still existed as of March 22, 2001, Sabzevari has not produced evidence of a causal nexus between his protests and the termination. The standard for proving causal nexus in retaliation cases is "causation-in-fact" or "but-for" causation. *See Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 972 (5th Cir. 1999) ("[t]o carry [his] ultimate Title VII burden, an employee must also show that [his] employer would not have taken the adverse employment action 'but for' the employee's participation in the protected activity"); *see also Septimus v. University of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). Nothing has been put forward suggesting that but for his protesting of the Dixon promotion and expressing his belief that he was not promoted due to his national origin, he would not have been fired despite failing to return to work after his March 8th medical release.

Moreover, the timing of the putative retaliation, an important factor in determining the presence of a causal link, also tends to negate any inference of a causal connection between his protests and Reliable's decision. *See, e.g., Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994). The Supreme Court in *Clark County School District v. Breeden*, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L.

Ed. 2d 509 (2001) (per curiam), cited with approval circuit court decisions holding that intervals of three or four months between an employer's knowledge of protected activity and an adverse employment action were insufficient to suggest causation. Here, Sabzevari raised his concerns about Reliable's practices in the August/September 2000 timeframe. The termination letter was sent March 22, 2001, some six months or more later. This temporal gap seriously undermines any inference of retaliation by Reliable.

Further, assuming for the sake of argument that Sabzevari has established a prima facie case of retaliation, he has also offered no evidence to rebut or contradict Reliable's legitimate, non-retaliatory explanation for the termination letter, namely, that he did not return to work. Sabzevari was released to return to work without restriction by his physician on March 8, 2001. Corresponding with Sabzevari's counsel, Reliable conveyed its expectation that Sabzevari return to work when that happened.[13] Sabzevari did not do so. Reliable therefore construed Sabzevari's unexplained absence for nearly two weeks as a "constructive quit."[14] There is no proof that this was pretext for retaliation. Accordingly, there being no genuine issue of material fact, summary judgment must be granted in favor of Reliable on the retaliation claim.

3. Constructive Discharge

Reliable also moves for summary judgment on Sabzevari's constructive discharge claim, "if any," because it falls outside the scope of his EEOC charges.[15] The court agrees. As discussed above, a plaintiff must first exhaust his administrative remedies by filing a

charge with the EEOC. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). A civil lawsuit filed under Title VII is "limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *see also Thomas v. Texas Dep't of Criminal Justice*, 220 F.3d 389, 395 (5th Cir. 2000). Failure to assert a claim in the charge or its lack of development in the course of a reasonable investigation of the charge precludes a plaintiff from later lodging the claim in a civil suit. *National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711-12 (5th Cir. 1994). Sabzevari did not assert constructive discharge in either of his EEOC charges.

This is not necessarily fatal to an assertion of discrimination if it is "like or related to" other claims of prohibited employment actions presented in the EEOC charge. *See, e.g., Dollis*, 77 F.3d at 781. That is not the case here. The following is the full text of Sabzevari's statement in his amended EEOC charge filed August 29, 2002:

> I. I have been employed with Respondent since October 1993. In August or September 2000, I began to question Respondent's practices regarding promotion and insurance agent hiring criteria which I believed to be in violation of Title VII of the Civil Rights Act of 1964, as amended. In October 2000, I requested that I be transferred back to the Austin office. Initially, the request was granted without issue. This request was not honored. Instead, I was required to move within 25 miles of Beaumont or be

demoted.

II. Reynard Rayson, District Manager, stated that I could transfer to Austin. November 21, 2000, Michael Wheeler, Division Manager, mailed me a letter stating that if I did not move within 25 miles of the district office in Beaumont, I could not continue in my current position of Assistant Manager in Beaumont.

III. I believe I am being discriminated against because of my national origin, Iranian, and in retaliation for reporting Respondent's discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended.

IV. I wish to amend this charge to include failure to promote. I was denied promotion to the position of District Manager in Missouri, on or about September 2000, due to my national origin.[16]

As is readily seen, Sabzevari's constructive discharge allegation is not like or related to the national origin and failure to promote claims in the EEOC charge. *Cf. Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993); *O'Brien v. Lucas Assoc. Personnel, Inc.*, 127 Fed. Appx. 702, 708 (5th Cir. 2005) (unpublished) (hostile work environment claim beyond the scope of EEOC claim where plaintiff only alleged Title VII violation for discharge/demotion); *Clayton v. Rumsfeld*, 106 Fed. Appx. 268, 271 (5th Cir. 2004) (unpublished) (finding that former employee field to raise the issue of constructive discharge in the administrative process,

and was therefore precluded from pursuing that claim in her Title VII suit).

Sabzevari therefore did not exhaust his administrative remedies on the constructive discharge claim, and Reliable must be granted summary judgment on this issue.

4. Punitive Damages

Lastly, Reliable seeks judgment as a matter of law on Sabzevari's claim for punitive damages. Under Title VII, "A complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). No evidence offered by Sabzevari supports the assertion that Reliable acted with malice or reckless indifference. Moreover, there being no viable claims left, the issue of damages is moot.

Conclusion

For these reasons, Reliable Life Insurance Company's motion for summary judgment is GRANTED.

Signed on June 15, 2006, at Houston, Texas.

Gray H. Miller
United States District Judge

[1] Dkt. 28, Ex. 1.

[2] *See* Dkt. 28, Ex. 10B-10F.

[3] *See* Dkt. 28, Ex. 10G.

[4] *See* Dkt. 28, Ex. 5.

[5] *See* Dkt. 28, Ex. 1.

[6] *See* Dkt. 28, Ex. 1.

[7] One of the central purposes of the EEOC charge is to put the employer on notice of the existence and nature of the charges. *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 878-79 (5th Cir. 2003), *cert. denied*, 540 U.S. 1107, 124 S. Ct. 1060, 157 L. Ed. 2d 892 (2004). Allowing a complaint to encompass allegations outside of the ambit of the predicated EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge. *Cheek v. Western & S. Life Ins. Co*, 31 F.3d 497, 500 (7th Cir. 1994); *see also Clayton v. Rumsfeld*, 106 Fed. Appx. 268, 271 (5th Cir. 2004) (unpublished).

[8] Texas is a "deferral" state, meaning that claimants in Texas must file their charge of discrimination within 300 days after the alleged unlawful employment practice occurred. *See Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998); *Blumberg v. HCA Mgmt. Co., Inc.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S. Ct. 789, 102 L. Ed. 2d 781 (1989).

[9] A common equitable exception is for continuing violations. Under the continuing violation theory, a court may consider otherwise time-barred incidents that occurred outside the three hundred day statutory period. *See, e.g., Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). A failure to promote, however, is considered a discrete discriminatory act that occurs on a given day, rather than a continuing violation. *See National R.R. Corp. v. Morgan*, 536 U.S. 101, 114 (2002). "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to

acts alleged in timely filed charges." *Id.* at 113. Thus, the continuing violation exception does not apply, nor does Sabzevari invoke the "relation back" doctrine.

[10] *See* Dkt. 36, p. 14.

[11] *But see Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir. 1997) (refusal to transfer can support retaliation claim where such is a customary practice).

[12] Dkt. 36, p. 14.

[13] *See* Dkt. 28, Ex. 10B-10E.

[14] Dkt. 28, Ex. 10G.

[15] Reliable points out that Sabzevari did not plead constructive discharge in his complaint. *See* Dkt. 1. Sabzevari counters that he did not quit -- Reliable terminated him. *See* Dkt. 36, n.11. Sabzevari offers the constructive discharge claim in his response to the summary judgment motion in the alternative -- to the extent that the trier of fact might conclude he quit, then he maintains he was constructively discharged. *Id.* Because the court has found that Sabzevari left his employment with Reliable before Reliable terminated him, and because Sabzevari is the non-movant, the court will give the plaintiff the benefit of the doubt on this matter and address the constructive discharge claim.

[16] Dkt. 28, Ex. 1.

CIVIL ACTION H-03-3240

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MEHRDAD SABZEVARI, Plaintiff, vs. THE RELIABLE LIFE INSURANCE CO., Defendant.

August 10, 2006, Decided
August 10, 2006, Filed

COUNSEL: For Mehrdad Sabzevari, Plaintiff: Stephen J Schechter, Attorney at Law, Seabrook, TX.

For The Reliable Life Insurance Company, Defendant: G Mark Jodon, Allan Huddleston Neighbors, IV, Littler Mendelson, Houston, TX.

JUDGES: Gray H. Miller, United States District Judge.

OPINION BY: Gray H. Miller

OPINION

MEMORANDUM AND ORDER

Before the court is plaintiff Mehrdad Sabzevari's motion to vacate (Dkt. 42) the opinion on summary judgment issued June 15, 2006. This motion is granted in part; denied in part. The court will vacate that portion of the opinion impacted by the Supreme Court's recent decision in *Burlington Northern & Santa Fe Ry.*

v. White, 548 U.S. ___, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). The court's ultimate granting of summary judgment in favor of The Reliable Life Insurance Co., however, will remain undisturbed for the reasons explained below.

LEGAL STANDARDS

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to alter or amend judgment within 10 days after entry of judgment. Rule 59(e) has been interpreted as covering motions to vacate judgments, in addition to motions to modify or amend. *See Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993) (*citing Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 9 L. Ed. 2d 222) (1962)). Although reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly, a Rule 59(e) motion may be justified by an intervening change in controlling law. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d 1995). On the other hand, Rule 59(e) is not simply a vehicle to reargue facts and theories upon which a court has already ruled, or to raise new arguments that could have been presented before judgment was entered. *See, e.g., Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001); *Steele v. Young*, 11 F.3d 1518, 1520 n.1 (10th Cir. 1993); *Fox v. Am. Airlines, Inc.*, 295 F. Supp. 2d 56, 59 (D.D.C. 2003); *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) ("[Rule 59(e)] motions cannot be used to raise

arguments which could, and should, have been made before the judgment issued").

Under Rule 60(b)(6), a court may relieve a party from a final judgment for "(6) any other reason justifying relief from the operation of the judgment" based on a motion made within a reasonable time. In the Fifth Circuit, however, a subsequent change in decisional law is not a basis for invoking Rule 60(b)(6). In this circuit, relief under Rule 60(b)(6) will be granted only if extraordinary circumstances are present. *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990), *cert. denied*, 498 U.S. 829, 111 S. Ct. 89, 112 L. Ed. 2d 61 (1990). A change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment. *Bailey*, 894 F.2d at 160; *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 337 (5th Cir. 2005), *cert. denied*, 546 U.S. 813, 126 S. Ct. 335, 163 L. Ed. 2d 47 (2005). The court will therefore confine its consideration to Rule 59(e).

ANALYSIS

The court interprets Sabzevari's motion as seeking to vacate (1) that portion of the opinion relying on the proposition that an "adverse employment action" is limited to "ultimate employment actions, " and (2) those portions of the opinion granting summary judgment on plaintiff's failure to promote and constructive discharge claims. As to the second portion, the motion does not demonstrate a need to revisit these issues. As explained in the opinion, Reliable is clearly entitled to judgment as a matter of law on both the failure to promote and constructive discharge claims because

they were not a part of Sabzevari's EEOC charge. Sabzevari simply reurges his prior argument that these claims were properly before the court.

Turning to the retaliation claim, as the parties are already familiar with the facts and reasoning set forth in the summary judgment opinion, the court will not repeat them at length here. Sabzevari alleged Reliable retaliated against him with respect to two discrete employment actions: (i) by denying him a lateral transfer from Beaumont to Austin, and (ii) by terminating his employment.[1]

As discussed in the summary judgment opinion, a prima facie claim of retaliation has three elements: (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse action against the employee; and (3) a causal connection exists between the protected activity and the adverse employment action. *See Hockman v. Westward Communs., LLC*, 407 F.3d 317, 330, 122 Fed. Appx. 734 (5th Cir. 2004); *Walker v. Thompson*, 214 F.3d 615, 628-29 (5th Cir. 2000). A recent Supreme Court opinion has clarified what may constitute an "adverse employment action" and the court's analysis will be limited to reexamining that portion of its summary judgment opinion concerning this second factor.

1. Denial of a Lateral Transfer

Examining first the alleged denial of a lateral transfer from Beaumont to Austin, the summary judgment opinion noted that under Fifth Circuit case law, an employment decision was only adverse where it was an "ultimate employment decision." *Mattern v. Eastman*

Kodak Co., 104 F.3d 702, 707-08 (5th Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S. Ct. 336, 139 L. Ed. 2d 260 (1997). Under this standard, the denial of the transfer request to Austin was not an ultimate employment decision and thus not an adverse employment action. *See, e.g., Burger v. Cent. Apt. Mgmt.*, 168 F.3d 875, 879 (5th Cir. 1999) ("[r]efusing an employee's request for a purely lateral transfer does not qualify as an ultimate employment decision"); *see also Wakefield v. State Farm Ins.*, 229 F.3d 1148 (5th Cir. 2000) (unpublished table decision) (an opportunity to be reviewed for a promotion or a lateral move is not an ultimate employment decision).

The standard for showing an adverse employment action has since changed, and therefore the court will vacate that portion of its opinion relying on the "ultimate employment decision" criteria. In *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415, the Supreme Court adopted the formulation of "adverse employment action" set forth by the Seventh and the District of Columbia Circuits. An "adverse employment action" is now one that a reasonable employee would find to be materially adverse, *i.e.*, one that might dissuade a reasonable worker from making or supporting a charge of discrimination under Title VII of the Civil Rights Act of 1964. *See id.* Despite this change, Sabzevari's retaliation claim nevertheless still fails under *Burlington Northern* and its adoption of the "material adverse" standard of the Seventh and District of Columbia Circuits. The plaintiff has not provided summary judgment evidence showing that he suffered a material employment action, and thus does not raise a genuine issue of material fact that he suffered an adverse employment action.

In the summary judgment opinion, the court noted that the Seventh Circuit holds that apurely lateral transfer is not generally a materially adverse employment action. The Seventh Circuit has posited that:

> Obviously a *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either. Otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.

Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) (emphasis in original) (citations omitted).

The Seventh Circuit holds that a transfer, or the denial of a transfer, is not normally an "adverse employment action." *See, e.g., Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661-62 (7th Cir. 2005); *Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 745 (7th Cir. 2002), *cert. denied*, 540 U.S. 984, 124 S. Ct. 472, 157 L. Ed. 2d 375 (2003); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). "By and large a reassignment that does not affect pay or promotion opportunities lacks this potential to dissuade and thus is not actionable." *Washington*, 420 F.3d at 662. Sabzevari has put forth no evidence that the transfer to Austin would have affected his pay or promotional opportunities; the two positions were identical other than Sabzevari's personal preference for the Austin position. Particularly on point is *Herrnreiter*, 315 F.3d

at 745, where the Seventh Circuit explained that where two jobs are equivalent, other than in idiosyncratic terms-such as the purely subjective preference of the employee for one position over another-an employer's refusal to transfer an employee from one position to another is not an adverse employment action for purposes of retaliation.

Sabzevari's denied request for a purely lateral transfer fares no better under District of Columbia Circuit case law. The District of Columbia Court of Appeals has also explained that

> The clear trend of authority . . . is to hold that a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A survey of the relevant case law shows that the authority requiring a clear showing of adversity in employee transfer decisions is both wide and deep.

Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999) (internal quotation marks and citations omitted). In *Brown*, as in this case, the plaintiff claimed retaliation where she was transferred to a position she did not desire and later refused a transfer to a position she did desire. *Id.*

The District of Columbia Circuit later added:

> Actions short of an outright firing can be adverse withing the meaning of Title VII, but not all lesser actions by employers count. As we wrote in *Brown*, 199 F.3d at 457, "[m]ere idiosyncracies

> of personal preference are not sufficient to state an injury." *See Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). Purely subjective injuries, such as dissatisfaction with a reassignment, *see Brown*, 199 F.3d at 457, or public humiliation or loss of reputation, *see Stewart v. Evans*, 348 U.S. App. D.C. 382, 275 F.3d 1126, 1136 (D.C. Cir. 2002), are not adverse actions.

Forkkio v. Powell, 353 U.S. App. D.C. 301, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002) (footnote omitted).

2. Termination of Employment

The Supreme Court's opinion in *Burlington Northern* does not affect the court's analysis of Sabzevari's purported retaliatory termination. That section of the summary judgment opinion will not be altered.

CONCLUSION

Accordingly, plaintiff Mehrdad Sabzevari's motion to vacate the summary judgment opinion issued June 15, 2006 is GRANTED in part; DENIED in part. The judgment in favor of defendant Reliable Life Insurance Co. remains unchanged.

Signed on August 10, 2006, at Houston, Texas.

Gray H. Miller/United States District Judge

Footnote

[1] *See* Dkt. 36, p. 14.

Filed 2/26/2008

No. 06-20888

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEHRDAD SABZEVARI,
Plaintiff-Appellant

v.

THE RELIABLE LIFE INSURANCE COMPANY,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

JUDGES: Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

IT IS ORDERED that the petition for rehearing is denied.